A

SETIAUSAHA SURUHANJAYA PASUKAN POLIS & ORS v. CHEAH YEN KHEE & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
CLEMENT SKINNER JCA
ALIZATUL KHAIR OSMAN JCA
B ROHANA YUSUF JCA
[CIVIL APPEALS NO: B-01-258-11 & B-01-259-11]
31 DECEMBER 2015

C ***ADMINISTRATIVE LAW:*** *Judicial review – Dismissal of police officer – Whether valid – Whether extraneous and irrelevant factors taken into account – Whether affidavit submitted bore no relationship to charge – Whether allegations in affidavit amounted to new charge – Failure to afford opportunity to explain or rebut allegations – Whether breach of fundamental principles of natural justice – Whether dismissal null and void – Federal Constitution, art. 135(2)*

D ***ADMINISTRATIVE LAW:*** *Rules of natural justice – Dismissal of police officer – Whether valid – Whether extraneous and irrelevant factors taken into account – Whether affidavit submitted bore no relationship to charge – Whether allegations in affidavit amounted to new charge – Failure to afford opportunity to explain or rebut allegations – Whether breach of fundamental principles of natural justice –* E *Whether dismissal null and void – Federal Constitution, art. 135(2)*

PUBLIC SERVANTS: *Dismissal – Dismissal of police officer – Whether valid – Whether extraneous and irrelevant factors taken into account – Whether affidavit submitted bore no relationship to charge – Whether allegations in affidavit amounted to new charge – Failure to afford opportunity to explain or rebut* F *allegations – Whether breach of fundamental principles of natural justice – Whether dismissal null and void – Federal Constitution, art. 135(2)*

Both these appeals arose out of the decision of the Judicial Commissioner ('JC') of the Shah Alam High Court in Appeal No. B-01-258-11 ('Appeal G 258') and Appeal No. B-01-259-11 ('Appeal 259'). At the hearing before the JC, both parties agreed that the decision in Appeal 258 would be binding on Appeal 259 as they involved the same facts and issues. The respondent in Appeal 258, an investigating officer with the IPD Daerah Kuala Pilah, was charged for the offence of dishonestly arranging for and receiving the payment of RM50,000 by one Tan Chee Keng in return for the release of the H latter's brother from police detention, thereby violating the code of conduct under reg. 4(2)(f) of the Public Officers (Conduct and Discipline) Regulations 1993 (Amendment 2002) ('the Regulations'). The Suruhanjaya Pasukan Polis ('the first appellant') found the respondent guilty of the aforesaid charge and dismissed him from the police force pursuant to reg. 38(g) of the Regulations. I The respondent filed his application for judicial review for, *inter alia*,

a declaration that his dismissal from the police force was null and void and in breach of art. 135(2) of the Federal Constitution. The respondent in Appeal 259, a senior investigation officer with IPD Subang Jaya, was charged with the failure to appear at a trial in court without valid reasons and failure to comply with the procedures in the management of the seizure of goods, thereby violating the code of conduct under reg. 4(2)(g) of the Regulations ('the first and second charge') and for dishonestly receiving payment of RM50,000 by one Tan Chee Keng in return for the release of the latter's brother, thereby violating the code of conduct under reg. 4(2)(f) of the Regulations ('third charge'). The respondent was then informed that he was found guilty of all three charges and that, whilst in respect of the first charge he received only a warning, he was dismissed from the police force in respect of the second and third charges. Dissatisfied, the respondent in Appeal 259 filed an application for judicial review. The JC allowed the respondent's application as he found that the first appellant had taken into account extraneous factors in arriving at its decision. The JC's decision was based on the affidavit-in-reply of the first appellant whereby in para. 4, the first appellant had taken into consideration matters pertaining to the alleged misuse and abuse of power by both the respondents in the course of carrying out their duties under 'Ops Viper'. Hence, the first appellant appealed against the said decision. The sole issue before the court in both appeals was whether the first appellant had taken into account extraneous and irrelevant factors in arriving at its decision based on the said para. 4 thereby rendering the decision null and void.

Held (dismissing appeals with costs)
Per Alizatul Khair Osman JCA delivering the judgment of the court:

(1) It is a principle of law based on established judicial precedent that in a situation where a public decision making body takes into account extraneous matters behind the backs of the party aggrieved by the decision, the decision of that public authority will be rendered unlawful for being in breach of the principles of 'natural justice', or '*audi alterem partem*' and for being unreasonable (in the *Wednesbury* sense) and procedurally unfair. (para 31)

(2) Paragraph 4 of the said affidavit bore no relationship at all to the charge faced by the respondent, which was in relation to the conduct of the respondent in corruptly arranging together with the respondent in Appeal 259 for the payment of RM50,000 by Tan Chee Keng, in return for the release of the latter's brother from police detention. Paragraph 4 of the said affidavit on the other hand referred to investigations carried out by the Bahagian Tatatertib Bukit Aman, in respect of the alleged misuse and abuse of power by the respondent when carrying out 'Ops Viper', an operation undertaken by the respondent against those

suspected to be involved in 'kes jenayah harta benda' and 'samun kargo lori'. It was clear that '*ex facie*' the charge did not relate to Ops Viper. The charge made no mention of the operation code named 'Ops Viper' allegedly undertaken by the respondent against suspects involved in criminal activities relating to theft of property and cargo laden lorries. The JC was correct in holding that the first appellant had taken into account extraneous factors in arriving at its decision to dismiss the respondent from the police force. (paras 33-39)

(3) The allegations contained in the said para. 4 amounted to a new charge against the respondent in respect of which the respondent was not given an opportunity to explain, contradict or rebut the same. Failure of the first appellant to afford this opportunity to the respondent constituted a breach of the fundamental principles of natural justice as enshrined in art. 135(2) of the Federal Constitution. The first appellant had infringed the rules of natural justice in not affording the respondent the opportunity to controvert the allegations contained in the said para. 4 which would have played a part in influencing the first appellant's decision to impose 'the severest punishment' of dismissal from the police force under the Regulations. (paras 45-52)

Bahasa Malaysia *Headnote*

Kedua-dua rayuan ini berbangkit daripada keputusan Pesuruhjaya Kehakiman ('PK') di Mahkamah Tinggi Shah Alam dalam Rayuan No. B-01-258-11 (Rayuan 258) dan Rayuan No. B-01-259-11 (Rayuan 259). Semasa perbicaraan di hadapan PK, kedua-dua pihak bersetuju bahawa keputusan dalam Rayuan 258 terikat dengan Rayuan 259 kerana kedua-duanya melibatkan fakta dan isu yang sama. Responden dalam Rayuan 258, seorang pegawai penyiasat IPD Daerah Kuala Pilah, telah dituduh atas kesalahan membuat rundingan dan mengatur untuk menerima wang sogokan RM50,000 dengan cara tidak amanah daripada satu Tan Chee Keng bagi tujuan pembebasan adiknya daripada tahanan polis, dengan itu dia melakukan pelanggaran tatakelakuan di bawah per. 4(2)(f) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) ('Peraturan-Peraturan'). Suruhanjaya Pasukan Polis ('perayu pertama') mendapati responden bersalah atas pertuduhan tersebut dan menamatkan perkhidmatannya daripada pasukan polis menurut Peraturan 38(g) Peraturan-Peraturan. Responden memfailkan permohonan semakan kehakiman untuk, antara lain, perisytiharan bahawa pemecatannya dari pasukan polis terbatal dan tidak sah kerana melanggar per. 135(2) Perlembagaan Persekutuan. Responden dalam Rayuan 259, seorang pegawai penyiasat kanan IPD Subang Jaya, dituduh gagal hadir untuk perbicaraan mahkamah tanpa sebab munasabah dan kegagalan mematuhi prosedur tatacara menguruskan barang rampasan, oleh itu dia telah melakukan pelanggaran tatakelakuan di bawah

per. 4(2)(g) Peraturan-Peraturan ('pertuduhan pertama dan kedua') dan bahawa dia, bersama-sama dengan responden Rayuan 258, telah menerima wang sogokan berjumlah RM50,000 dengan cara tidak amanah oleh Tan Chee Keng bagi tujuan pembebasan adiknya daripada tahanan polis, oleh itu dia melakukan pelanggaran tatakelakuan di bawah per. 4(2)(f) Peraturan-Peraturan ('pertuduhan ketiga'). Responden kemudiannya dimaklumkan bahawa dia didapati bersalah atas ketiga-tiga pertuduhan dan bahawa, walaupun dia diberi amaran berkenaan pertuduhan pertama, dia telah ditamatkan perkhidmatan daripada pasukan polis berhubung pertuduhan kedua dan ketiga. Tidak berpuas hati, responden dalam Rayuan 259 memfailkan permohonan semakan kehakiman. PK membenarkan permohonan responden sambil mendapati bahawa perayu pertama mengambil kira faktor-faktor yang tidak berkaitan dalam membuat keputusannya. Keputusan PK adalah berdasarkan afidavit jawapan perayu pertama di mana dalam perenggan 4, perayu pertama telah mempertimbangkan perkara-perkara yang berkaitan dengan dakwaan penyelewengan serta salahguna kuasa oleh kedua-dua responden semasa menjalankan tugas mereka di bawah 'Ops Viper'. Oleh itu, perayu pertama merayu terhadap keputusan tersebut. Isu utama di hadapan mahkamah dalam kedua-dua rayuan adalah sama ada perayu pertama telah mengambil kira faktor-faktor yang tiada kaitan atau tidak relevan dalam mencapai keputusannya berdasarkan perenggan 4 tersebut, dan dengan itu menjadikan keputusan terbatal dan tidak sah.

Diputuskan (menolak rayuan-rayuan dengan kos)
Oleh Alizatul Khair Osman HMR menyampaikan penghakiman mahkamah:

(1) Adalah satu prinsip undang-undang berdasarkan duluan kehakiman yang mantap bahawa dalam situasi di mana pihak berkuasa awam membuat keputusan dengan mengambil kira perkara-perkara yang tidak berkaitan tanpa pengetahuan pihak-pihak terkilan dengan keputusan, maka keputusan pihak berkuasa awam itu menyalahi undang-undang kerana melanggar prinsip-prinsip 'natural justice', atau '*audi alterem partem*' dan tidak munasabah (dalam erti kata *Wednesbury*) dan berlakunya ketidakadilan prosedur.

(2) Perenggan 4 afidavit jawapan tersebut tiada hubungan langsung dengan pertuduhan yang dihadapi oleh responden, yang berkaitan dengan kelakuan responden yang secara tidak amanah mengatur dengan responden dalam Rayuan 259 untuk bayaran RM50,000 oleh Tan Chee Keng sebagai pulangan untuk pembebasan adiknya daripada tahanan polis. Perenggan 4 afidavit tersebut pula merujuk pada siasatan yang dijalankan oleh Bahagian Tatatertib Bukit Aman, berkenaan dakwaan penyelewengan dan salahguna kuasa oleh responden apabila

A mengendalikan Ops Viper, satu operasi yang dijalankan oleh responden terhadap mereka yang disyaki terlibat dengan kes jenayah harta benda dan samun kargo lori. Jelas bahawa *ex facie* pertuduhan tidak mempunyai perhubungan dengan Ops Viper. Pertuduhan itu langsung tidak menyebut kod pengendalian yang dinamakan Ops Viper yang
B didakwa ditanggung oleh responden-responden terhadap suspek-suspek yang terlibat dengan aktiviti jenayah berhubung dengan kecurian harta dan lori yang dipenuhi dengan kargo. PK betul apabila memutuskan bahawa perayu pertama mengambil kira faktor-faktor yang tiada kaitan dalam mencapai keputusannya untuk memecat responden daripada
C pasukan polis.

(3) Dakwaan-dakwaan yang terkandung dalam perenggan 4 terjumlah kepada tuduhan baru terhadap responden yang mana responden tidak diberikan peluang untuk menjelaskan, menyanggah dan menyangkalnya. Kegagalan perayu memberikan peluang ini kepada responden
D merupakan pelanggaran prinsip-prinsip keadilan asasi seperti yang termaktub dalam per. 135(2) Perlembagaan Persekutuan. Perayu pertama melanggar peraturan keadilan asasi dalam tidak memberikan peluang kepada responden untuk mempertikaikan dakwaan-dakwaan yang terkandung dalam perenggan 4 yang boleh memainkan peranan
E dalam mempengaruhi keputusan perayu pertama untuk mengenakan hukuman paling tegas iaitu pemecatan daripada pasukan polis di bawah Peraturan-Peraturan.

Case(s) referred to:

B Surinder Singh Kanda v. The Government Of The Federation Of Malaya [1962] 1 LNS 14 PC ***(refd)***

F *Mat Ghaffar Baba v. Ketua Polis Negara & Anor [2008] 1 CLJ 773 CA* ***(refd)***

Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 CA ***(refd)***

Sazali Abdullah v. Ketua Polis Negeri Perak & Ors [2006] 8 CLJ 567 HC ***(refd)***

Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419 SC ***(refd)***
G

Legislation referred to:

Federal Constitution, art. 135(2)

For the appellants - Norliza Zulkifli, SFC (Nur Farhana Baharuddin, FC with her); State Legal Advisor's Office, Selangor

H *For the respondent - Mohaji Selamat; M/s The Law Practice Of Mohaji & Hazury*

[Editor's note: Appeal from High Court, Shah Alam; Judicial Review No: 13-11-2009 (affirmed)]

Reported by Suhainah Wahiduddin

I

JUDGMENT

Alizatul Khair Osman JCA:

[1] Both these appeals arose out of the decision of the learned Judicial Commissioner of the Shah Alam High Court in *Setiausaha Suruhanjaya Pasukan Polis & 2 Yg Lain v. Cheah Yen Khee* (Appeal No. B-01-258-11) (Appeal No. 258). Appeal No. 258 was heard together with *Setiausaha Suruhanjaya Pasukan Polis & 2 Yg Lain v. Ratnakumar a/l Ramasamy* (Appeal No. B-01-259-11) (Appeal No. 259). At the hearing before the learned Judicial Commissioner both parties agreed that the decision in Appeal No. 258 would be binding on Appeal No. 259 as they involve the same facts and issues.

[2] As stated by the learned Judicial Commissioner in his grounds of judgment in Appeal No. 258 "Kes ini telah dibicarakan bersama kes permohonan Ratnakumar a/l Ramasamy terhadap responden-responden yang sama (Semakan Kehakiman No. 13-12-2009) yang melibatkan fakta dan isu yang serupa. Dengan itu keputusan yang sama seperti di atas juga diberi dalam kes ini."

[3] The learned Judicial Commissioner had at the conclusion of the hearing allowed the application for judicial review by the respondent, Cheah Yen Khee in Appeal No. 258.

Background Facts

(a) Appeal No. 258

[4] The respondent, Cheah Yen Khee joined the police force on 31 July 1987 and after undergoing basic police training at Pulapol, reported for duty as a police constable at Balai Polis Sentul in January 1988.

[5] In 1998, the respondent was promoted to the post of police inspector and placed in IPD Subang Jaya as an investigating officer (IO) until 2001 when he was transferred to IPD Subang Jaya.

[6] In September 2005, the respondent received instructions that he was to be transferred to Ibu Pejabat Polis Daerah Kuala Pilah, Negeri Sembilan without any reasons and allegations levelled against him.

[7] In 2006 the respondent was served with a suspension order, which order remained in force until his dismissal from the police force in 2009.

[8] On 7 September 2007, the respondent received a letter from the first appellant informing him that a *prima facie* case had been made out against him in respect of the following charge:

> Bahawa anda sebagai Pegawai Awam iaitu Inspektor (1/14503) Cheah Yen Khee dalam pasukan Polis DiRaja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Jenayah, Ibupejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak jujur atau tidak amanah kerana anda telah

membuat rundingan dan mengatur tempat pertemuan untuk menerima wang sogokan yang berjumlah RM50,000 (Lima Puluh Ribu Ringgit Malaysia) daripada Tan Chee Keng (K/P: 710302-10-5155) bagi tujuan pembebasan adiknya Tan Chee Lai (K/P:760609-14-5165) daripada tahanan polis. Pada 18.3.2005, jam lebih kurang 3.00 petang wang sogokan tersebut telah diserahkan kepada ASP (G/13817) Ratnakumar a/l Ramasamy yang berada di dalam sebuah kereta Perodua Kembara, nombor pendaftaran WJY5581 yang dipandu oleh anda sendiri. Namun begitu, apabila Tan Chee Lai gagal dibebaskan, Tan Chee Keng telah meminta wang RM50,000 dikembalikan kalau tidak beliau akan membuat laporan polis terhadap anda. Sehubungan dengan ini, anda telah mengembalikan wang sogokan dengan memasukkan wang tersebut ke dalam akaun Public Bank nombor 4341512128 milik Tan Chee Keng pada 25 Mac 2005. Oleh yang demikian anda telah melakukan pelanggaran tatakelakuan di bawah Peraturan 4 (2)(f), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (pindaan) 2002 seperti berikut:

4(2) Seorang pegawai tidak boleh:

(g) tidak jujur atau tidak amanah

[9] The respondent denied the aforesaid charge and on 19 February 2008 submitted his written representation to the first appellant. In his representation the respondent alleged that he had a strong defence to the charge including the defence of alibi which required an oral hearing before an investigation committee.

[10] As with the respondent Ratnakumar a/l Ramasamy in Appeal No. 259, the respondent herein made a similar request (to the first appellant) that he be supplied with the necessary information and documents relating to the aforesaid charge. However he was unsuccessful and his application to the court was similarly dismissed.

[11] On 16 April 2009, the respondent was served with a letter from the secretary of the first appellant dated 19 March 2009 (Pemberitahuan Hukuman Tatatertib) informing him that the first appellant had found him guilty of the aforesaid charge and dismissed from the police force pursuant to Peraturan 38(g) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002).

[12] Following from the abovesaid decision, the respondent filed his application for judicial review for, *inter alia*, a declaration that his dismissal from the police force is null and void for being in breach of art. 135(2) of the Federal Constitution in that it contravened the principles of natural justice.

(b) Appeal No. 259

[13] The respondent, Ratnakumar a/l Ramasamy joined the police force as a cadet ASP on 1 December 1997. On 15 August 1998 the respondent was posted to IPD Petaling Jaya where he served as Senior Investigation Officer at the Bahagian Siasatan Jenayah until 2001.

[14] From 2001 until March 2005 the respondent was the Senior Investigation Officer with IPD Subang Jaya. On 5 March 2005, the respondent was transferred to IPD Ipoh as ASP in charge of administration (ASP pentadbiran). A

[15] In August 2006, the respondent was served with a suspension order dated 18 August 2006 issued by the then Deputy Inspector General of Police, Tan Sri Musa bin Hj Hassan. B

[16] Subsequently in 2007, the respondent received a letter from the Suruhanjaya Pasukan Polis (the first appellant herein) dated 7 September 2007 alleging that a *prima facie* case has been made out against the respondent in respect of the following three charges: C

(a) Pertuduhan Pertama:

Bahawa anda sebagai Pegawai Awam iaitu Penolong Penguasa (G/13817) Ratnakumar a/l Ramasamy dalam pasukan Polis DiRaja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Kanan, Ibu Pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak bertanggungjawapan iaitu anda gagal untuk hadir dalam perbicaraan mahkamah jenayah kes nombor MA2-83-2863/2003 tanpa sebab-sebab yang munasabah dan di mana sapina telah dikeluarkan serta disampaikan kepada anda itu sapina nombor M945957untuk perbicaraan pada 20 Mei 2004; M354869 untuk perbicaraan pada 19 Oktober 2004 dan N215839 untuk perbicaraan pada 26 April 2005 di Mahkamah Majistret Klang. Kegagalan anda untuk hadir telah menyebabkan kes tersebut terpaksa ditangguhkan sebanyak empat (4) kali kerana anda adalah saksi utama iaitu pengadu dan pegawai serbuan kes. Ini adalah bertentangan dengan kehendak seksyen 20(3)(i) Akta Polis 1967 yang menyatakan bahawa salah satu tugas am polis ialah menghadiri mahkamah jenayah. Oleh yang demikian anda telah melakukan perlanggaran tatakelakuan di bawah Peraturan 4(2)(g), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) seperti berikut: D E F

4(2) Seorang pegawai tidak boleh: G

(g) tidak bertanggungjawab

(b) Pertuduhan Kedua

Bahawa anda sebagai Pegawai Awam iaitu Penolong Penguasa (G/13817) Ratnakumar a/l Ramasamy dalam pasukan Polis DiRaja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Kanan, Ibu Pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak bertanggungjawapan iaitu anda tidak mematuhi prosedur tatacara menguruskan barang-barang rampasan Selangor anda didapati gagal membawa balik barang-barang rampasan hasil serbuan di Lot 16290, Taman Cheras Perdana, Balakong Selangor Lampiran 'A' kepada Batu 9 Cheras Repot:2431/2005 bertarikh 14.3.2005 ke IPD Subang Jaya. Sebaliknya anda hanya membawa balik sejumlah kecil barang- H I

barang rampasan tersebut sebagai 'sampel barang bukti' manakala bakinya disimpan di dalam gudang Lot 16290, taman Cheras Perdana, Balakong sehingga waktu Selangor pada keesokannya iaitu pada 15.3.2005 tanpa jagaan dan pengawasan rapi pihak polis. Oleh yang demikian anda telah melakukan perlanggaran tatakelakuan di bawah Peraturan 4(2)(g), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) seperti berikut:

4(2) Seorang pegawai tidak boleh:

(g) tidak bertanggungjawab

(c) Pertuduhan Ketiga

Bahawa anda sebagai Pegawai Awam iaitu Penolong Penguasa (G/13817) Ratnakumar a/l Ramasamy dalam pasukan Polis DiRaja Selangor ketika itu bertugas sebagai Pegawai Penyiasat Kanan, Ibu Pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak jujur atau tidak amanah kerana anda bersama dengan Inspektor Cheah Yen Khee telah menerima wang sogokan berjumlah RM50,000 (Lima Puluh Ribu Ringgit Selangor) daripada Tan Chee Keng (K/P: 710302-10-5155) pada 18.3.2005 jam lebih kurang 3.00 petang yang mana pada masa tersebut anda berada di dalam sebuah kereta Produa Kembara, nombor pendaftaran WJY 5581 yang dipandu oleh Inspektor Cheah Yen Khee, di kawasan sekitar Restoran McDonald, Taman Selangor Permai berhampiran dengan IPD Subang Jaya, Selangor sebagai balasan supaya membebaskan adiknya iaitu Tan Chee Lai (K/P:760609-14-5165) daripada tahanan polis berkait dengan kes Batu 9 Cheras Repot: 2431/2005 bertarikh 14.3.2005. Oleh yang demikian anda telah melakukan perlanggaran tatakelakuan di bawah Peraturan 4(2)(f), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) seperti berikut:

4(2) Seorang pegawai tidak boleh:

(g) tidak jujur atau tidak amanah

(emphasis added)

[17] The respondent denied all three charges and applied for and was granted extension of time by the first appellant to make his representation.

[18] His request for information and documents pertaining to the charges to enable him to put up his representation was however not acceded to by the first appellant.

[19] The respondent then applied by way of summons in chambers for an order that he be supplied with such information and documents but his application was dismissed by the court. Following the dismissal of this application, the respondent then submitted his representation to the first appellant on 19 February 2008.

[20] On 21 April 2009 the respondent was served with a letter from the secretary of the first appellant dated 19 March 2009 (Pemberitahuan Hukuman Tatatertib) informing him that he was found guilty of all three charges and that, whilst in respect of the first charge he received only a warning, he was dismissed from the police force in respect of the second and third charges.

[21] Dissatisfied with the aforesaid decision, the respondent filed an application for judicial review in the High Court in Shah Alam.

Decision Of The High Court

[22] The learned Judicial Commissioner allowed the respondent's application for judicial review as he found that the first appellant had taken into account extraneous factors in arriving at its decision. The learned Judicial Commissioner's decision was based on the affidavit in reply of the Secretary of the Suruhanjaya Pasukan Polis, one Dato' Raja Azahar bin Raja Abdul Manap, dated 9 March 2010 where he states at para. 4 (the said para. 4) as follows:

> Saya juga menyatakan bahawa Bahagian Tatatertib Bukit Aman telah menerima arahan daripada Ketua Polis Negara untuk menjalankan siasatan salah laku Pemohon yang telah dilaporkan oleh Penolong Pengarah D9, Jabatan Siasatan Jenayah Bukit Aman berhubung dengan penyelewengan serta salahguna kuasa semasa menjalankan tugas serbuan dan tangkapan terhadap saspek yang melibatkan kes jenayah harta benda dan samun kargo lori. Operasi yang dijalankan oleh Pemohon ini dikenali sebagai 'Ops Viper'. Penyelewengan dan salahguna kuasa ini dikesan telah dilakukan sejak tahun 2001 hingga tahun 2005.

[23] As found by the learned Judicial Commissioner:

> … adalah jelas bahawa keputusan yang dibuat oleh Responden telah dipengaruhi oleh faktor-faktor yang tidak berkaitan dan amat prejudis terhadap Pemohon. Ini telah menyebabkan berlaku ketidakadilan terhadap Pemohon.

Issue

[24] The sole issue before the court in both appeals was whether the first appellant had taken into account extraneous and irrelevant factors in arriving at its decision based on the said para. 4 thereby rendering the decision null and void. It should be noted that the said Dato Raja Azahar bin Raja Abdul Manap filed the same affidavit in reply containing the said para. 4 in both judicial review applications in the High Court.

Submissions

[25] For the appellants, Senior Federal Counsel (SFC) submitted that the learned Judicial Commissioner had erred when he found that the first appellant had taken into account extraneous factors based on the said

A para. 4. It was the submission of learned SFC that 'Ops Viper' referred to in para. 4 of the said affidavit was not a new charge nor an extraneous factor as alleged by the respondent.

[26] The first appellant was merely explaining the background leading to the charge against the respondent when referring to 'Ops Viper' in the B affidavit. 'Ops Viper' was the name of the operation undertaken by the respondent against those suspected to be involved in 'kes jenayah harta benda' and 'samun kargo lori'. The respondent was alleged to have misused and abused his power in the course of carrying out the said operation. In this regard, the first appellant stressed that it did not take into account any C extraneous factors in considering the charge against the respondent. Rather, in arriving at its decision the first appellant had taken into consideration only the relevant facts and documents before it.

[27] The learned Judicial Commissioner had therefore erred in concluding that based merely on the said para. 4 the first appellant had taken into D account irrelevant facts which were prejudicial to the respondent. The respondent had been given every opportunity to defend himself against the charges including extension of time to put up his representation to the first appellant. Therefore there was no injustice caused to the respondent to warrant the court to exercise its powers of judicial review.

E

[28] Learned counsel for the respondent, on the other hand argued that the learned Judicial Commissioner's decision was in accord with the principles of natural justice as no man shall be condemned unheard.

[29] In this case, it would appear from the said para. 4 that the first F appellant had taken into consideration extraneous matters pertaining to the alleged misuse and abuse of power by both the respondents in the course of carrying out their duties under 'Ops Viper'. According to the deponent of the said affidavit, Dato' Raja Azahar bin Abdul Manap, the alleged abuse of power by the respondents had been going on since 2001 until 2005. However it was very clear from the charges framed against both respondents that the G charges did not relate to 'Ops Viper' and the alleged abuse of power allegedly committed by the respondents between 2001 and 2005 while carrying out their duties under 'Ops Viper'.

[30] The respondent's representation also made no mention of the same. H These allegations in fact amounted to a new charge against the respondent and was highly prejudicial to the respondent as he was not given an opportunity to rebut these allegations.

[31] In this regard, it was learned counsel for the respondent's submission that it is a principle of law based on established judicial precedent that in a I situation where a public decision making body takes into account extraneous

matters behind the backs of the party aggrieved by the decision, the decision of that public authority will be rendered unlawful for being in breach of the principles of 'natural justice', or *'audi alterem partem'* and for being unreasonable (in the *Wednesbury* sense) and procedurally unfair. The respondents relied, *inter alia*, on the following authorities in support of their submission:

(a) *B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 LNS 14; [1962] 1 MLJ 169

(b) *Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619

(c) *Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor* [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419; [1990] 3 MLJ 364

(d) *Mat Ghaffar Baba v. Ketua Polis Negara & Anor* [2008] 1 CLJ 773

(e) *Sazali Abdullah v. Ketua Polis Negeri Perak & Ors* [2006] 8 CLJ 567

Our Decision

[32] Having heard both parties' submission, we found that the learned Judicial Commissioner did not err in law or in fact in arriving at his decision and we therefore dismiss the appeal with costs.

[33] In our view the learned Judicial Commissioner was correct in holding that the appellants, in particular the first appellant, had taken into account extraneous factors in arriving at its decision to dismiss the respondent from the police force.

[34] We agree with learned counsel for the respondent that contrary to the SFC's assertion para. 4 of the said affidavit bears no relationship at all to the charge faced by the respondent. To recapitulate the charge faced by the respondent reads as follows:

> Bahawa anda sebagai Pegawai Awam iaitu Inspektor (I/14503) Cheah Yen Khee dalam Pasukan Polis Diraja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Jenayah, Ibupejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak jujur atau tidak amanah kerana anda telah membuat rundingan dan mengatur tempat pertemuan untuk menerima wang sogokan yang berjumlah RM50,000 (Lima Puluh Ribu Ringgit Malaysia) daripada Tan Chee Keng (KP: 710302-10-5155) bagi tujuan pembebasan adiknya Tan Chee Lai (KP: 760609-14-5165) daripada tahanan polis. Pada 18.3.2005, jam lebih kurang 3.00 petang wang sogokan tersebut telah diserahkan kepada ASP (G/13817) Ratnakumar a/l Ramasamy yang berada di dalam sebuah kereta Perodua Kembara, nombor pendaftaran WJY5581 yang dipandu oleh anda sendiri. Namun begitu, apabila Tan Chee Lai gagal dibebaskan, Tan Chee Keng telah meminta wang RM50,000 dikembalikan kalau tidak beliau akan membuat laporan polis terhadap anda. Sehubungan dengan ini, anda telah

mengembalikan wang sogokan dengan memasukkan wang tersebut ke dalam akaun Public Bank nombor 4341512128 milik Tan Chee Keng pada 25 Mac 2005. Oleh yang demikian anda telah melakukan pelanggaran tatakelakuan di bawah Peraturan 4(2)(f), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (pindaan) 2002 seperti berikut:

4 (2) Seseorang pegawai tidak boleh:

(f) tidak jujur atau tidak amanah.

[35] For completeness, the charge faced by the respondent in Appeal No. 259 were as follows:

(a) Pertuduhan Pertama:

Bahawa anda sebagai Pegawai Awam iaitu Penolong Penguasa (G/13817) Ratnakumar a/l Ramasamy dalam pasukan Polis DiRaja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Kanan, Ibu Pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak bertanggungjawapan iaitu anda gagal untuk hadir dalam perbicaraan mahkamah jenayah kes nombor MA2-83-2863/2003 tanpa sebab-sebab yang munasabah dan di mana sapina telah dikeluarkan serta disampaikan kepada anda itu sapina nombor M945957 untuk perbicaraan pada 20 Mei 2004; M354869 untuk perbicaraan pada 19 Oktober 2004 dan N215839 untuk perbicaraan pada 26 April 2005 di Mahkamah Majistret Klang. Kegagalan anda untuk hadir telah menyebabkan kes tersebut terpaksa ditangguhkan sebanyak empat (4) kali kerana anda adalah saksi utama iaitu pengadu dan pegawai serbuan kes. Ini adalah bertentangan dengan kehendak seksyen 20(3)(i) Akta Polis 1967 yang menyatakan bahawa salah satu tugas am polis ialah menghadiri mahkamah jenayah. Oleh yang demikian anda telah melakukan perlanggaran tatakelakuan di bawah Peraturan 4(2)(g), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) seperti berikut:

4(2) Seorang pegawai tidak boleh:

(g) tidak bertanggungjawab

(b) Pertuduhan Kedua

Bahawa anda sebagai Pegawai Awam iaitu Penolong Penguasa (G/13817) Ratnakumar a/l Ramasamy dalam pasukan Polis DiRaja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Kanan, Ibu Pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak bertanggungjawapan iaitu anda tidak mematuhi prosedur tatacara menguruskan barang-barang rampasan Selangor anda didapati gagal membawa balik barang-barang rampasan hasil serbuan di Lot 16290, Taman Cheras Perdana, Balakong Selangor Lampiran 'A' kepada Batu 9 Cheras Repot: 2431/2005 bertarikh 14.3.2005 ke IPD Subang Jaya. Sebaliknya anda hanya membawa balik sejumlah kecil barang-barang rampasan tersebut sebagai 'sampel barang bukti' manakala bakinya disimpan di dalam gudang Lot 16290, taman Cheras

Perdana, Balakong sehingga waktu Selangor pada keesokannya iaitu pada 15.3.2005 tanpa jagaan dan pengawasan rapi pihak polis. Oleh yang demikian anda telah melakukan perlanggaran tatakelakuan di bawah Peraturan 4(2)(g), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) seperti berikut:

4(2) Seorang pegawai tidak boleh:

(g) tidak bertanggungjawab

(c) Pertuduhan Ketiga

Bahawa anda sebagai Pegawai Awam iaitu Penolong Penguasa (G/13817) Ratnakumar a/l Ramasamy dalam pasukan Polis DiRaja Selangor ketika itu bertugas sebagai Pegawai Penyiasat Kanan, Ibu Pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak jujur atau tidak amanah kerana anda bersama dengan Inspektor Cheah Yen Khee telah menerima wang sogokan berjumlah RM50,000 (Lima Puluh Ribu Ringgit Selangor) daripada Tan Chee Keng (K/P: 710302-10-5155) pada 18.3.2005 jam lebih kurang 3.00 petang yang mana pada masa tersebut anda berada di dalam sebuah kereta Produa Kembara, nombor pendaftaran WJY 5581 yang dipandu oleh Inspektor Cheah Yen Khee, di kawasan sekitar Restoran McDonald, Taman Selangor Permai berhampiran dengan IPD Subang Jaya, Selangor sebagai balasan supaya membebaskan adiknya iaitu Tan Chee Lai (K/P:760609-14-5165) daripada tahanan polis berkait dengan kes Batu 9 Cheras Repot: 2431/2005 bertarikh 14.3.2005. Oleh yang demikian anda telah melakukan perlanggaran tatakelakuan di bawah Peraturan 4(2)(f), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) seperti berikut:

4(2) Seorang pegawai tidak boleh

(g) tidak jujur atau tidak amanah.

(emphasis added)

[36] The said para. 4, if it can be recalled, states to the following effect:

Saya juga mengatakan bahawa Bahagian Tatatertib Bukit Aman telah menerima arahan daripada Ketua Polis Negara untuk menjalankan siasatan salahlaku Pemohon yang telah dilaporkan oleh Penolong Pengarah D9, Jabatan Siasatan Jenayah Bukit Aman berhubung dengan *penyelewengan serta salahguna kuasa semasa menjalankan tugas serbuan dan tangkapan terhadap saspek yang melibatkan kes jenayah harta benda dan samun kargo lori.*

Operasi yang dijalankan oleh Pemohon ini dikenali sebagai "Ops Viper". Penyelewengan dan salahguna ini dikesan telah dilakukan sejak tahun 2001 hingga tahun 2005.

(emphasis added)

[37] As can be seen from the above, the charge against the respondent was very specific. It relates to the conduct of the respondent in corruptly arranging together with the respondent in Appeal No. 259 (Ratnakumar a/l Ramasamy) for the payment of the sum of RM50,000 by one, Tan Chee Keng, in return for the release of the latter's brother, Tan Chee Lai, from police detention. The incident was alleged to have taken place on 18 March 2005.

[38] Paragraph 4 of the said affidavit on the other hand, refers to an investigation carried out by the Bahagian Tatatertib Bukit Aman, in respect of the alleged misuse and abuse of power by the respondent when carrying out 'Ops Viper', which was allegedly detected to have taken place in 2001 until 2005.

[39] It is clear from the above that *'ex-facie'* the charge did not relate to 'Ops Viper'. It made no mention of the operation code named 'Ops Viper' allegedly undertaken by the respondent against suspects involved in criminal activities relating to theft of property and cargo laden lorries.

[40] There was also no reference in the charge to the alleged misuse and abuse of power by the respondent in carrying out 'Ops Viper' which had allegedly taken place since 2001 until 2005.

[41] In light of the above, we were unable to agree with learned SFC's submission that "'Ops Viper' bukanlah pertuduhan baru atau faktor luaran seperti yang dinyatakan di dalam afidavit balasan responden".

[42] Learned SFC in her written and oral submissions explained that the first appellant was merely stating the background of the investigation and stressed that in arriving at its decision it had taken into account only the relevant facts and documents.

[43] However learned SFC's submission that in the said para. 4 the first appellant was merely explaining the background of the investigation and not alleging a new fact or charge was merely a statement from the Bar as the appellants failed to file any affidavit asserting the same, in response to the respondent's affidavit in reply. In respect of the allegation contained in the said para. 4, the respondent had stated as follows:

> 10. Merujuk kepada perenggan 4 Afidavit Jawapan Responden Pertama dan Kedua, saya sesungguhnya menyatakan bahawa pengataan tersebut perlu dibatalkan dari rekod Mahkamah dan tidak diambil kira dalam pertimbangan kes ini kerana kandungan pengataan tersebut menimbulkan pertuduhan-pertuduhan baru ke atas Pemohon selain dari satu-satunya yang ditimbulkan dalam pertuduhan disiplin ke atas saya di mana antara lainnya dakwaan baru bahawa Pemohon telah melakukan penyelewengan dan melakukan salah guna kuasa semasa menjalankan serbuan dan tangkapan terhadap saspek yang melibatkan kes jenayah harta

benda dan samun kargo lori dalam operasi "Ops Viper" dan kesalahan penyelewengan dan salahguna kuasa ini dikesan TELAH dilakukan sejak tahun 2001 hingga tahun 2005.

12. Saya sesungguhnya menyatakan bahawa pengataan bahawa "kesalahan penyelewengan dan salahguna kuasa ini [oleh Pemohon] dikesan TELAH dilakukan sejak tahun 2001 hingga tahun 2005 adalah fitnah dan tohmahan semata-mata serta amat memprejudiskan dan berniat jahat kerana jika benarlah pihak polis telah mengesahkan saya telah melakukan kesalahan-kesalahan tersebut dari tahun 2001 hingga tahun 2005 [6 tahun], kenapa saya tidak dituduh di mana-mana Mahkamah untuk kesalahan tersebut [saya nafikan dengan keras] dan kenapa satu-satunya pertuduhan disiplin ke atas saya tidak berkaitan dan tidak bersangkutan langsung dengan kesalahan-kesalahan yang baru ditimbulkan tersebut.

[44] In view of the foregoing we found ourselves in agreement with learned respondent's counsel's submission that based on the said para. 4 the first appellant had indeed taken into account extraneous and irrelevant factors in arriving at its decision to dismiss the respondent from the police force.

[45] We also agreed with learned counsel that the allegations contained in the said para. 4 amounted to a new charge against the respondent in respect of which the respondent was not given an opportunity to explain, contradict or rebut the same.

[46] Failure of the first appellant to afford this opportunity to the respondent, constituted in our view a breach of the fundamental principles of natural justice as enshrined in art. 135(2) of the Federal Constitution.

[47] In this regard we refer to the celebrated case of *Surinder Singh Kanda v. The Government of the Federation of Malaya (supra)* in which Lord Denning made the following observation:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, LC in *Board of Education v. Rice* down to the decision of their Lordship's Board in *Ceylon University v. Fernando.*
>
> > It follows, of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing.

[48] Lord Denning's legal proposition in the aforesaid case have been consistently applied by our courts in a number of cases involving disciplinary action by public authorities, most notably the case of *Shamsiah Ahmad Shah v. Public Services Commission (supra)*, the facts of which are somewhat similar to the facts in the appeal before us.

[49] In holding that *Shamsiah*'s dismissal was null and void, Jemuri Serjan SCJ speaking for the Supreme Court, found as follows:

> The core of the appellant's complaint in regard to the breach of the rules of natural justice was the fact that the first respondent, in arriving at its decision to dismiss her from service, took to account extraneous matters, namely the appellant's record of past conduct which were entered in her record of service and produced by the Director-General of the Government Printers Department, Kuala Lumpur to the first respondent without giving her an opportunity to explain, contradict or rebut them.
>
> What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them.
>
> It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conduct, considering that the dismissal of a civil servant is no light matter.
>
> We wish to add that it has been held that tribunals must not continue privately to obtain evidence or other information between the conclusion of the hearing and the making of the decision, without notifying the parties so as to give them an opportunity to make submissions on it. See for example *R v. Deputy Industrial Injuries Commissioner, ex p Jones and Fairmont Investments Ltd v. Secretary of State for the Environment.*
>
> It was manifestly demonstrated to us that the first respondent had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under 1969 Regulations.
>
> On this ground and based on the authorities we have cited in our judgment we have no alternative but to allow this appeal.

[50] Similarly here the allegations contained in the said paragraph can be said to relate to the respondent's past conduct which were not made available to the respondent.

[51] And here too the core complaint of the respondent is that the first appellant had breached the principles of natural justice in that in arriving at its decision to dismiss him from service. The first appellant had taken into consideration extraneous matters namely the respondent's past conduct based on the allegations contained in the said para. 4, without giving him an opportunity to defend himself against the said allegations.

[52] Applying the principles set out in *Surinder Singh Kanda* and *Shamsiah Ahmad Sham* above we found that the first appellant had infringed the rules of natural justice in not affording the respondent the opportunity to explain or controvert the allegations contained in the said para. 4 which in our view would have played a part in influencing the first appellant's decision to impose "the severest punishment" of dismissal from the police force under the Public Officers (Conduct and Discipline) Regulations 1993 (Amendment 2002).

[53] As trenchantly observed by Jemuri Serjan SCJ in *Shamsiah bte Ahmad Sham*:

> It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conduct, considering that the dismissal of a civil servant is no light matter.

[54] For the above reasons we dismissed the appeal with costs. As agreed by parties our decision in this appeal would be binding on appeal No. 259 and as such Appeal No. 259 is also dismissed with costs.